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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LINDA BROWN MARSHALL and DONALD MARSHALL,
Petitioners,

v.

BANKERS LIFE AND CASUALTY COMPANY,
an Illinois Corporation,
FRANK B. HALL AND COMPANY OF CALIFORNIA,
a California Corporation, and MIA ADMINISTRATORS,
a California Corporation,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of California

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employer that purchases at its expense a group insurance policy in order to provide health, life and disability benefits for its employees has established an "employee welfare benefit plan" or "welfare plan" within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(1) (1988), so that the provision and denial of benefits are governed by ERISA to the exclusion of preempted state law.

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No. 92-580

LINDA BROWN MARSHALL and DONALD MARSHALL,
Petitioners,

v.

BANKERS LIFE AND CASUALTY COMPANY,
an Illinois Corporation,
FRANK B. HALL AND COMPANY OF CALIFORNIA,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This action seeks general, special and punitive damages arising from an alleged failure to pay medical benefits due under a group insurance policy issued by Bankers Life and Casualty Company ("Bankers") to Miller Import Datsun, Inc. ("Miller"). According to stipulated facts, (Petition for Writ of Certiorari, Appendix, "Pet. App." at 53a-60a), Miller's employee

manual stated that all employees would be provided with group insurance coverage. (Pet. App. at 57a-58a, ¶ 4.) Miller purchased the policy in issue as part of an employee benefit package in order to provide health, life and disability insurance to its employees and their dependents. (Pet. App. at 54a, ¶¶ 6, 7.) Miller purchased the Bankers policy effective March 1, 1983 and cancelled it effective October 1, 1983, replacing it with a policy purchased from a different insurer. (Pet. App. at 12a-13a.)

All Miller employees were covered by the Bankers policy, and the full premiums for their coverage were paid by Miller. (Pet. App. at 54a, ¶¶ 7, 8; Pet. App. at 55a, ¶ 14.) Employees were permitted to enroll their dependents for coverage under the policy at their own expense. (Pet. App. at 55a, ¶ 15.) Petitioner Donald Marshall was an employee of Miller covered under the policy. (Pet. App. at 55a, ¶ 9.) His wife, petitioner Linda Marshall, was covered as a dependent under the policy. (Pet. App. at 55a, ¶ 9.) Most of the administration of the policy was performed by Frank B. Hall and Company of California ("FBH") which was appointed by Bankers and made all decisions whether to pay or deny benefit claims. (Pet. App. at 57a, ¶ 1; Pet. App. at 58a, ¶ 8.) Miller also performed minor administrative functions.[1]

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[1] Miller's functions included remitting employee and dependent premiums, (Pet. App. at 55a, ¶¶ 14, 15); providing enrollment forms and change cards to employees and sending the completed forms to FBH, (Pet. App. at 56a, ¶¶ 17-18); providing claim forms to employees, (Pet. App. at 55a, ¶ 19); advising FBH of employees who had been hired or had terminated employment, (Pet. App. at 55a, ¶ 16); distributing to employees informational books that described the policy, (Pet. App. at 56a, ¶ 21); and

While the Bankers policy was in force, Linda Marshall submitted a claim for hospitalization expenses which was initially denied. (Pet. App. at 54a, ¶ 1.) Although the claim was ultimately paid, the Marshalls brought suit in a California court seeking extra-contractual damages on various state law causes of action. (Pet. App. at 26a.) As an affirmative defense, Bankers and FBH asserted that the Marshalls' claims were preempted because they related to an "employee benefit plan" subject to ERISA, *see* 29 U.S.C. § 1144(a) (1988). The defense was sustained by the trial court, whose decision was reversed by a division of the California Court of Appeal. That decision was in turn reversed by the California Supreme Court which held that "an employee benefit plan is established on these facts despite the employer's minimal involvement in plan administration and complete non-involvement in claims processing. An action seeking remedies under state law for an improper denial of benefits is, therefore, preempted". (Pet. App. at 1a-2a) (citations omitted).

SUMMARY OF ARGUMENT

The question presented for review concerns whether an employer which provides health benefits to its employees through the purchase of a group insurance policy must also administer the policy's provision of benefits in order for the benefit program to be a "welfare plan" subject to ERISA. The California Supreme Court correctly held that such employer administration was not a necessary condition of ER-

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responding to employees' questions regarding the policy and referring to FBH questions that Miller could not answer, (Pet. App. at 56a-57a, ¶ 23).

ISA coverage. That decision is faithful to ERISA's plain statutory language, which does not include a requirement of employer administration, and accords with interpretations of the Department of Labor, the federal agency charged with interpretation of the relevant provision of ERISA. Despite petitioners' attempts to portray a conflict among lower courts over this question, no such conflict in fact exists. On the contrary, the decision below is consistent with decisions of this Court and with an unbroken line of authority in the federal circuits. The few decisions on which petitioners rely all involve a fact pattern which represents a fundamental distinction from this case, and all derive from a single decision, the relevant rationale of which has been abandoned in its own circuit and rejected elsewhere. Accordingly, there is no reason why the decision below warrants review by this Court.

ARGUMENT

I. Introduction to Argument

Causes of action based on state law are preempted by ERISA if they relate to an "employee benefit plan", including an "employee welfare benefit plan". 29 U.S.C. § 1002(4), § 1144(a) (1988); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). Section 3(1) of ERISA, 29 U.S.C. § 1002(1) (1988), defines an "employee welfare benefit plan" or "welfare plan" to include "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits. . . ."

There is no dispute that the medical benefits at issue here are described in Section 3(1) or that the statute expressly contemplates that benefits under a "welfare plan" may be provided "through the purchase of insurance". Likewise, there is no dispute that Miller was an "employer" or that the Marshalls were "participants" or "beneficiaries" if an ERISA plan existed. *See* 29 U.S.C. §§ 1002(5)-(8) (1988). The only question is whether through its purchase of the Bankers policy Miller "established or maintained" a "plan, fund, or program" for providing employee benefits.

While petitioners occasionally suggest otherwise, there can be no doubt that a "plan" or "program" of benefits existed here. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987), this Court characterized a "plan" or "program" of benefits as involving "a commitment systematically to pay certain benefits" and as requiring such functions as "determining the eligibility of claimants, calculating benefit levels, making disbursements . . . and keeping appropriate records". Miller's purchase of the policy, Bankers' contractual commitment to provide benefits, and FBH's performance of the typical administrative functions necessary to fulfill such a commitment conclusively demonstrate that a benefit "plan" or "program" existed.[2]

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[2] Moreover, the administrative contract between Bankers and FBH expressly refers to the benefits under the policy as a "plan". (Pet. App. at 57a, ¶ 1.) Even petitioners repeatedly refer to the question presented here as involving employer administration of an insurance or benefit "program". (Petition for Writ of Certiorari, "Pet." at 3, 10, 11, 12, 13.)

The core question presented by petitioners is, in their phrase, whether "*any* program which provides benefits of the type described in ERISA and which requires ongoing administrative activity constitutes a 'plan'" or whether, instead, "only a program of benefits described in ERISA which requires ongoing administrative activity *by an employer* constitute[s] a 'plan'[ ]". (Pet. at 12) (emphasis in original).[3] Petitioners argue that review should be granted because this question is an important one due to the prevalence throughout the United States of "health insurance . . . provided through an employment relationship", and because there is "a split in authority among both federal and state courts" over the question. (Pet. at 8, n.2.)

Neither of these grounds warrants review. ERISA was intended to provide comprehensive and uniform federal regulation of employee benefit plans, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 n.20 (1983), and to "'elimina[te] the threat of conflicting or inconsistent State and local regulation of employee benefit plans'". *Pilot Life* at 46 (quoting 120 Cong. Rec. 29,933 (1974)). As the petition itself asserts, Miller's

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[3] In the California Supreme Court, petitioners unsuccessfully argued that the facts that Miller never intended to create an ERISA plan and did not comply with certain ERISA requirements should mean that no ERISA coverage existed. *See* Pet. App. at 15a-17a. Although their petition to this Court refers to these facts, it does not argue that they present any issue warranting review by this Court. In view of the relevant case law, this position is readily understandable. *See Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 328 (2d Cir. 1985) *aff'd*, 477 U.S. 901 (1986); *see also Fort Halifax* at 18 n.10.

arrangement for providing health insurance to its employees through purchase of a group insurance policy represents "the most common arrangement of insuring for health care costs in the United States" and is "a 'garden variety'" such arrangement. (Pet. at 7, quoting Pet. App. at 37a.) Certainly, if the California Supreme Court had not found ERISA coverage of such a typical employee benefit program, it would have opened a gaping hole in the uniform federal regulation mandated by ERISA. The decision by the California Supreme Court that ERISA does apply to Miller's program, however, preserves ERISA's mandate of uniform regulation. Moreover, as discussed below, that decision does not conflict with, but is instead consistent with, all pertinent authority.

II. The Decision Below is Consistent with the Statutory Language and Agency Interpretation

Nothing in the statute supports petitioners' argument that an employer must administer an employee benefit program to constitute the program a plan subject to ERISA. ERISA's statutory language contains no requirement of employer administration but merely states that a plan to provide benefits may be established or maintained by an employer "through the purchase of insurance or otherwise". 29 U.S.C. § 1002(1) (1988). Indeed, various provisions of ERISA confirm that administrative responsibilities under a plan may be freely delegated and allocated. *See* 29 U.S.C. §§ 1102(b)(2) and 1105(c)(1) (1988).[4]

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[4] Moreover, as the California Supreme Court observed, it is "common practice" for insurers or their third-party administrators to administer benefits under an insurance policy and "holders of group insurance policies commonly do not bear primary

The Department of Labor has repeatedly confirmed the plain meaning of the statute that self-administration of benefits by the employer is not a requirement of ERISA coverage. For example, in a 1976 opinion letter dealing with facts indicating no employer involvement in benefits administration, the Department opined that an employer which, like Miller here, had purchased a group insurance policy to provide health and other benefits to employees and their dependents had thereby established an ERISA plan.[5] Moreover, in regulations published shortly after the effective date of ERISA, the Department addressed the role of "certain group or group-type insurance programs" in the establishment of a statutory "welfare plan". 29 C.F.R. § 2510.3-1(j) (1991).[6] As explained in its pream-

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responsibility for processing claims". (Pet. App. at 7a.) This practice is well evidenced in the ERISA case law concerning insurers which exercise fiduciary discretion in a plan's administration. *See American Fed. of Unions v. Equitable Life Assurance Soc'y*, 841 F.2d 658, 662-63 (5th Cir. 1988); *Schulist v. Blue Cross of Iowa*, 717 F.2d 1127 (7th Cir. 1983).

[5] *See* United States Department of Labor, ERISA Opinion Letter 76-06 (April 30, 1976). The Department has also repeatedly taken the position—consistent with its position as plaintiff in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (en banc) and accepted by the court there—that an employer which purchased group health insurance for employees through a multiple employer trust has established an ERISA-covered "welfare plan" even though the employer lacked any administrative role in the benefit program. *See, e.g.*, United States Department of Labor, ERISA Opinion Letter 87-11A (December 21, 1987). The Department's regulations under ERISA's claim procedure provision, 29 U.S.C. § 1133 (1988), also expressly recognize that an employee benefit plan may be "*administered* by an insurance company", 29 C.F.R. §§ 2560.503-1(c)(1) and (g)(2) (1991) (emphasis added).

[6] 29 C.F.R. § 2510.3-1(j) (1991) provides:

ble to that regulation, the "key" to ERISA exclusion of a group insurance policy is "the absence of employer involvement". 40 Fed. Reg. 34,527 (August 15, 1975). Obviously, an employer's selection and purchase of a group policy constitutes a degree of involvement that is inconsistent with exclusion from ERISA coverage under the Department's interpretation and regulations.

The court below accorded "deference" to such reasonable views of the Department. In so doing, it did no more than pursue faithfully the teaching of this Court. *See Massachusetts v. Morash*, 490 U.S. 107, 116 (1989).

"*Certain group or group-type insurance programs.*

"For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which

"(1) No contributions are made by an employer or employee organization;

"(2) Participation in the program is completely voluntary for employees or members;

"(3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and

"(4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs."

III. The Decision Below is Consistent with This Court's Decisions

In their attempt to create an issue worthy of review by this Court, petitioners misread and thereby advance as supportive of their argument this Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). In *Fort Halifax*, the Court held that a Maine statute, which required employers to make a one-time lump sum severance payment to employees laid off through a plant closing, did not establish or require the maintenance of an ERISA plan. *Id.* at 6. The essential rationale underlying the Court's decision was that the phrase "plan, fund, or program" included in ERISA's definition of "welfare plan" connotes an ongoing administrative program to pay benefits. Because the Maine statute required only a one-time lump sum payment and not any ongoing benefit program, the Court concluded that it did not involve an ERISA plan.

The question decided in *Fort Halifax* relates to an entirely different issue, involving a different aspect of ERISA's definition of "welfare plan", than the question presented here. Because the benefit involved in *Fort Halifax*—severance pay—was payable from an *employer's* general assets and not from an insurance policy, the Court occasionally referred to *employer* administration as contextually relevant to the question it was deciding. But the question decided in *Fort Halifax* was whether there was sufficient ongoing administrative activity to constitute a "plan, fund, or program" in the first place—not whether an obviously ongoing plan had been "established or maintained" by an employer as opposed to some alternative precipitating cause. Thus, as the California Supreme

Court concluded: "Properly understood, *Fort Halifax* requires us to consider not the level of the *employer's* participation in an ongoing administrative program, but rather whether such a program exists at all." (Pet. App. at 8a.) (footnote omitted; emphasis in original). As discussed, *supra*, p. 5, there is no question that the Bankers policy constituted a "program" of benefits. *Fort Halifax*, therefore, does not address the question presented here and is fully consistent with the decision below.

Moreover, in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), this Court addressed an employee benefit program indistinguishable from the program at issue here. In *Pilot Life*, as here, the insurer possessed sole authority to make benefit determinations, and the employer's role "was predominantly a ministerial one". *Dedeaux v. Pilot Life Ins. Co.*, 770 F.2d 1311, 1312-13 (5th Cir. 1985), *rev'd*, 481 U.S. 41 (1987). Because no party in *Pilot Life* disputed such an arrangement's status as an ERISA plan, this Court did not separately address the question of ERISA applicability. The Court's holding that state law causes of action were preempted, however, was necessarily dependent on ERISA coverage. Thus, the conclusion reached below by the California Supreme Court is identical to the conclusion reached by this Court in *Pilot Life*.

IV. The Decision Below is Uniformly Consistent with the Applicable Authority in the Lower Courts

The federal circuits have uniformly followed the test established in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (en banc) for determining that a "plan, fund, or program" of benefits exists within the meaning of ERISA if "from the surrounding circum-

stances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of funding, and procedures for receiving benefits". *Id.* at 1373.[7] As the California Supreme Court stated: "[t]hese criteria are easily met in this case". (Pet. at 9a.) Indeed, although petitioners disparage the *Donovan v. Dillingham* test, they do not dispute that a "program" of benefits existed here.

Consistent circuit court authority also holds that an employer has "established or maintained" a plan when it purchases a group insurance policy to provide benefits to employees, even if the employer plays no role in benefits administration. *Donovan v. Dillingham* involved a multiple-employer trust, *i.e.*, a for-profit enterprise formed to sell health insurance to small employers for their employees and dependents. Although the employers played absolutely no role in administration of the trust or the policy, the court nonetheless held that, by their purchase of the policy, they had established welfare plans. *Id.* at 1373-75. All other circuits which have addressed this question have endorsed that view.[8]

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[7] *See, e.g., Peckham v. Gem State Mut. of Utah*, 964 F.2d 1043, 1047 (10th Cir. 1992); *International Resources Inc. v. New York Life Ins. Co.*, 950 F.2d 294, 297-98 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2941 (1992); *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 241-42 (5th Cir. 1990); *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1082-83 (1st Cir.), *cert. denied*, 111 S. Ct. 581 (1990); *Brundage-Peterson v. Compcare Health Servs. Ins. Corp.*, 877 F.2d 509, 511 (7th Cir. 1989); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989); *Harris v. Arkansas Book Co.*, 794 F.2d 358, 360 (8th Cir. 1986).

[8] *See Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d

Petitioners argue that this line of authority conflicts with *Taggart Corp. v. Life & Health Benefits Administration, Inc.*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) and two decisions which follow *Taggart*. In *Taggart*, the court held that a corporation which purchased insurance from a multiple employer trust to provide health coverage for the family of the corporation's owner, who was its sole employee, had not established an ERISA plan. Referring to the employer's actions as the "bare purchase[ ] of health insurance", the court stated that ERISA did not apply "where, as here, the purchasing employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits". *Id.* at 1211.

The overbroad reading which plaintiffs place on *Taggart's* language—*i.e.*, that employer administration of an insurance policy is necessary in order for an ERISA plan to exist—has been uniformly rejected by post-*Taggart* decisions in the federal circuits. In *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), the Court of Appeals for the then-newly created Eleventh Circuit considered *Taggart en banc*, as its rules required where it was considering deviation from a precedent of the former Fifth Circuit. In a unanimous

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178, 185 (6th Cir. 1992); *Memorial Hosp. Sys.* at 242-43; *Brundage-Peterson* at 511 (referring to a health insurance policy under which benefits were administered by the insurer, not the employer, as "a common method by which employers provide health and other welfare benefits to their employees, and not one that has heretofore been thought to take a benefits plan out of ERISA"); *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987) ("Even if an employer does no more than arrange for a 'group-type insurance program' it can establish an ERISA plan . . .").

decision—joined by the author of the *Taggart* opinion and by another member of the *Taggart* panel (both of whom had become judges of the Eleventh Circuit)—the *en banc* court expressly rejected the reading of *Taggart* which petitioners advance, holding instead that an employer need not administer a group insurance policy in order for ERISA coverage to apply. *Id.* at 1375.

Likewise, in *Memorial Hospital* the Court of Appeals for the Fifth Circuit, which had decided *Taggart*, also rejected a broad reading and limited *Taggart* to its owner/employee context. Addressing a fact situation identical to that presented here, *Memorial Hospital* followed *Donovan v. Dillingham* and held that an ERISA plan existed, stating: "[t]he fact that [the employer's] administrative functions under the policy are minimal is perfectly in keeping with its intent that [the insurer] administer the plan as well as insure it". 904 F.2d at 243. The same analysis has been followed in all of the other federal circuits that have addressed the question presented here. *See* cases cited at n.8, *supra*.

In *Memorial Hospital*, the court distinguished *Taggart* as involving only "the bare purchase of insurance by a lone employee" through a multiple employer trust. *Id.* at 242. The same distinction applies to the other two cases asserted by petitioners to be in conflict with the decision below. In *Gahn v. Allstate Life Insurance Co.*, 926 F.2d 1449 (5th Cir. 1991), a business owner purchased group health insurance through a multiple employer trust for himself and his immediate family who were the only employees of the business.[9] Likewise, *Turnbow v. Pacific Mutual Life*

[9] Moreover, in *Gahn*, the court did not adopt petitioners' broad

Insurance Co., 765 P.2d 1160 (Nev. 1988), *cert. denied*, 490 U.S. 1102 (1989), involved a claim by the sole proprietor of a liquor store who had purchased health insurance for herself and three employees through a multiple employer trust. Indeed, one of the bases on which the *Turnbow* court concluded that ERISA did not preempt her state law causes of action was that a sole proprietor cannot be an "employee" and thus cannot be a "participant" in a plan covered by ERISA. *Id.* at 1162 (alternative holding).

Because they involved claims by business owners or their immediate family members, the decisions in *Taggart*, *Gahn*, and *Turnbow* present no essential conflict with either the decision below or the overwhelming authority holding that an ERISA plan is established when an employer purchases, but does not administer, a group health insurance policy. Indeed, regulations of the U.S. Department of Labor provide that ERISA's definition of "welfare plan" does not include a plan which covers only a business owner and his or her spouse and covers no other common law employees. *See* 29 C.F.R. § 2510.3-3(b), (c)(1) (1991). But this case, in any event, presents no question relating to a benefit program concerning a business owner and his or her family members. Miller had some 193 full-time employees all of whom were covered by the benefit plan in issue. *See* Respondents' Appendix in Lieu of Clerk's Transcript filed in court below at 179, lines 18-21. Thus, this case is a wholly inappropriate vehicle for considering the continuing vitality, if any, of *Taggart* and its dwindling prog-

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reading of *Taggart* but instead applied its own precedent in *Memorial Hospital. See Id.* at 1452.

eny.[10] Moreover, in the relevant arena of plans relating to arms-length employer-employee relationships, the applicable authority is both singular and uniformly consistent with the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[10] Moreover, if the Court were to review that issue, it would undoubtedly want to do so in the context of a decision that had considered the significance of *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344 (1992), which, by holding that ERISA incorporates the common law definition of employee, casts doubt on the validity of both the Department of Labor regulations and even the limited rationale of *Taggart* and *Turnbow*.